

WARRINE F. HARDEN

IBLA 70-567

Decided March 15, 1972

Appeal from decision (Nev-054889) by Nevada land office, Bureau of Land Management, canceling desert entry.

Reversed and remanded.

Desert Land Entry: Final Proof--Equitable Adjudication: Substantial Compliance--Secretary of the Interior

Under principles of equitable adjudication embodied in 43 CFR 1871.1-7 (1972), a desert land entrywoman who fails personally to make final proof of claim within the period provided may be permitted to present her proof and have her claim adjudicated on its merits, where the reason for her delay is compelling.

APPEARANCES: Hugh Harden for appellant.

OPINION BY MR. FISHMAN

Warrine F. Harden has appealed from the decision of the Nevada land office, Bureau of Land Management, dated April 28, 1970, cancelling her desert land entry because (1) she failed to appear to make final proof at the time and place advertised and (2) she failed to complete her proof within the five year period allowed. 43 U.S.C. § 329 (1970). 43 CFR § 1823.1-1 and § 2226.1-5(j) (1970) now 43 CFR § 2521.6(j) (1972).

Appellant's desert land entry contains 314.42 acres in Nye County, Nevada. It was allowed on December 21, 1962. Annual proof of expenditure for the first, second and third years were respectively \$432, \$384 and \$312. The record shows that more extensive work was completed during the fourth entry year. By a decision dated January 4, 1967, the entrywoman was granted an extension until December 21, 1969, to make final proof.

Under 43 CFR 2226.1-5(j) (1970), now 43 CFR § 2521.6(j) (1972), the entrywoman was required to submit final proof within 90 days of December 29, 1969. Notice of intention to make proof forms were executed

by the entrywoman's agent, Hugh Harden, and received January 14, 1970. Appellant's agent requested that proof taking be scheduled March 18, 1970, and indicated that the entrywoman could appear at that time. Final proof was accordingly so scheduled for March 18.

By letter received March 14, 1970, appellant's agent advised that appellant would not be in the area until after the 20th of April. The entrywoman did not appear on the March 18 proof date, or during the 10 days thereafter while proof taking was continued. Three of the four witnesses listed in the notices did appear for the taking of final proof. Appellant appeared in the Ely District Manager's office April 24, 1970, but was not permitted to make proof.

Appellant states that during the period set for final proof she and her husband were enroute to Nevada from his post with a mission hospital in Ghana, West Africa, and could not be contacted to appear for final proof.

It is noteworthy that (1) her agent arranged for the taking of her proof on the basis of her scheduled return from Ghana; (2) she was unexpectedly detained there for an additional month; and (3) the agent used international telephone efforts to contact the appellant, but she could not be reached.

The function of final proof is to show that all the requirements of the desert land laws have been met. 43 U.S.C. § 329 (1970). Nadine K. Jones, Roy L. Jones, A-29762 and A-29764 (January 2, 1964). To that end, the Department's regulations specify in detail the procedure for making final proof and the showing that must be made as to such matters as cultivation and irrigation. 43 CFR § 2226.1-5 (1970), now 43 CFR § 2521.6 (1972). The testimony of the entryman is required to be given under oath separately from that of his two witnesses. 43 CFR 2226.1-5(d) (1970), now 43 CFR § 2521.6(d) (1972). The making of final proof in person by the entryman is thus an important part of the desert entry procedures.

Appellant has demonstrated her attempt to comply with the law in the efforts her agent made to arrange for an extension prior to expiration of the deadline. Appellant and her witnesses also assert that she has constructed substantial improvements on the claim, and that she otherwise substantially has complied with the requirements of law. The reason given for her delay in appearance is compelling. We believe that cancellation of the claim would be an unwarrantably harsh consequence for her delay in personally appearing to make final proof. As appellant points out, there are other situations (death of entryman,

in which it would be equitable and only practical for an extension of time to be granted, in conformity with the equitable adjudication concepts embodied in 43 CFR 1871.1-1 (1972).

Appellant's failure to appear for the taking of final proof is a deficiency which, considered in the light of her explanation, ought not to preclude consideration of the proof on its merits. Relief has previously been granted where an entryman's final proof was not satisfactorily given within the required period of time. Nadine K. Jones, Roy L. Jones, supra. Cf. John Howard Bayless, Fairbanks 09405, March 25, 1959 (late filing of application to purchase trade and manufacturing site); Juanita J. Anderson, 4 IBLA 170 (1971) (final proof of homestead).

Appellant will therefore be furnished an opportunity to submit her final proof. If the proof shows on its face full compliance with all the requirements of the law and regulations within the life of the entry and no reason appears after field examination for challenging the desert land entry, the proof will be accepted. Nadine K. and Roy L. Jones, supra. If the proof shows on its face noncompliance with some essential requirement, the proof will be rejected and the entry cancelled without a hearing. If the proof asserts compliance on its face but the Bureau believes that an essential requirement has not been met, then a contest will be brought against the entry at which time the opportunity for a hearing will be afforded.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision cancelling the claim is reversed, and the case is remanded to the Bureau of Land Management for further appropriate consideration.

Frederick Fishman, Member

We concur:

Edward W. Stuebing, Member

Douglas E. Henriques, Member

